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No. 01-123

IN THE

Supreme Court of the United States

JSG TRADING CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FOOD DISTRIBUTORS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF FOOD DISTRIBUTORS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief of Food Distributors International ("FDI") is filed with the consent of the parties, with the letters expressing consent having been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE[1]

FDI is a national trade association comprised of food distribution companies that supply and service independent grocers and foodservice operations throughout the United

[1] This brief was not written, in whole or in part, by counsel for any party to this proceeding. Pursuant to Rule 37.6, Sysco Corporation, a member of *amicus curiae* FDI, discloses that it has contributed monetarily to the preparation and submission of this brief.

States, Canada and 19 other countries. FDI has 220 members, ranging from small independent companies to Fortune 500 corporations, that operate 997 distribution centers and contribute $183 billion in annual sales to the economy, a significant portion of which is attributed to perishable produce. *See About FDI* (visited Aug. 9, 2001) <http://www.fdi.org/abtfdi/abtfdi.html>. Thus, a vast majority of FDI's members are licensees under the Perishable Agricultural Commodities Act of 1930 ("PACA") and nearly all of FDI's members are regulated by PACA.

The United States Department of Agriculture ("USDA") oversees the administration of PACA and, accordingly, regulates the $100 billion perishable agricultural commodities industry (sometimes referred to as "the industry"). The USDA has described the industry as "unique," because "a 1 or 2-day delay in marketing can mean the difference between profit and loss." *See* Agricultural Mktg. Serv., U.S. Dep't of Agric., *PACA Fact Finder* (last modified Apr. 2000) <http://www.ams.usda.gov/fvpaca/FactFinder.html>. Amplifying these inherent time pressures, the distribution chain from farm to consumer normally involves a variety of transactions between multiple parties, including growers, growers' agents, shippers, dealers, grocery and foodservice wholesalers and distributors, and retailers. *See* 7 C.F.R. §§ 46.2(j), (n)-(q) and (ii). Moreover, the buyers and sellers at points of distribution frequently are undisclosed, at least to each other, *see* 7 C.F.R. §§ 46.27(a)-(b), leaving purchasing agents and brokers with the primary role of mitigating the risks associated with sales or consignments of perishable produce. Purchasing agent transactions, which must be consummated quickly and often are memorialized by nothing more than a handshake, also routinely occur in the early morning hours to ensure that fresh produce is available when grocery stores, restaurants, schools and other mass feeders open at 6:00 or 6:30 a.m.

With the extraordinary level of trust placed in the hands of purchasing agents and brokers, PACA sellers (and FDI

members) historically have relied on goodwill efforts, including off-invoice agreements, to foster business relationships and hedge risk. As a recent report issued by the USDA's Economic Research Service acknowledges, it is standard industry practice to provide purchasing agents and buyers with any combination of volume incentives, earned-income credits, promotional allowances, rebates, free product discounts, buy-backs of unsold product, storage and slotting fees, and capital improvement fees. *See* Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* at (vi)-(vii), 27 (Jan. 2001). These off-invoice transactions often are provided as last-minute concessions, depending on the need to move produce that may be marketable only for a very limited time.

As one illustration of the good faith, legitimate business purpose of off-invoice transactions, consider the following scenario commonly faced by PACA licensees: A seller seeks to provide a purchasing agent with marginal boxes of avocados that will be difficult to sell under any circumstances, and impossible to sell if any significant amount of time lapses. Under normal market conditions, the purchasing agent would reject the avocados on behalf of the prospective buyer, leaving the seller with the loss. As an inducement to move the avocados closer to market, the seller proposes an off-invoice incentive, such as a rebate or an enhanced volume discount, to hedge, in whole or in part, the risk if the buyer later sustains a loss. The avocados then are accepted by the purchasing agent without any increase in the price paid by the buyer or the consumer. All concerned parties are better off and the marketplace works as it should.

After the USDA first interpreted PACA to implicitly prohibit commercial bribery, FDI and other interested trade associations mobilized to distinguish off-invoice transactions, which have been an essential component of the industry since well before the inception of PACA in 1930, from acts of

commercial bribery. *See* Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). In 1995, Congress responded by codifying the legality of good faith "collateral fees and expenses." 7 U.S.C. § 499b(4) ("section 2(4)"). Now, the USDA, as authorized by the Court of Appeals in *JSG Trading Corporation v. United States Department of Agriculture*, 235 F.3d 608 (D.C. Cir. 2001) ("*JSG Trading II*"), has attacked the continued viability of collateral fees and other off-invoice transactions despite the plain intent of Congress, as best reflected in the language of section 2(4). Indeed, if business continues "as usual" and in a manner considered legal for 71 years, many FDI members and other PACA participants may lose the licenses that allow them to participate in the marketplaces of our nation.

With respect to the specific proceedings below, JSG Trading Corporation ("JSG") has never been a member of, and has not otherwise been affiliated with, FDI. Accordingly, the particular facts of the underlying proceedings, including whether any acts of commercial bribery actually occurred, are not why FDI has joined these proceedings as *amicus curiae*. Instead, FDI is concerned that the decision in *JSG Trading II*, if left unaddressed by this Court, will materially disrupt the everyday business practices of the perishable agricultural commodities industry and invite standardless investigations contrary to the industry's reasonable expectations as defined by PACA and the regulations thereunder.[2]

STATEMENT OF THE CASE

FDI's paramount concern over leaving the USDA with unfettered discretion in license revocation enforcement

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[2] FDI also incorporates by reference Section A of the Statement of the Case of the Petition for Certiorari filed by JSG, which further demonstrates the critical importance of this matter to all participants in the perishable agricultural commodities industry.

actions is no better demonstrated than by a brief discussion of the ever-changing "standards" applied in the proceedings below. In 1993, the USDA brought commercial bribery charges against JSG pursuant to the following language within section 2(4):

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . .
>
> (4) . . . to fail without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. §§ 499b and 499b(4). Without identifying a single transaction that JSG specifically attempted to influence, the USDA argued that any payment exceeding a *de minimis* value made to a purchasing agent constituted a *per se* violation of PACA's implied prohibition against commercial bribery. *In re J.S.G. Trading Corp.*, 56 Agric. Dec. 1800, 1813 (1997), *aff'd*, 57 Agric. Dec. 640 (1998), *remanded by JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999). Thus, the USDA took the position that *any* payment or tangible item, other than the most trivial,[3] made or offered by a PACA licensee with the general intent to promote business could support a license revocation action pursuant to section 2(4).

On appeal, the District of Columbia Circuit reversed and remanded, holding that the *per se* test adopted by the USDA "deviate[d] dramatically from the standard test for commercial bribery" employed in two prior USDA decisions. *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d

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[3] Demonstrating the virtually unlimited reach of this test, the USDA has categorized a *de minimis* payment as "a pen, calendar or lighter." *In re J.S.G. Trading Corp.*, 56 Agric. Dec. at 1813 (citing to *In re Tipco, Inc.*, 50 Agric. Dec. 871, 882-883 (1990)).

536, 544 (D.C. Cir. 1999) ("*JSG Trading I*") (citing *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991) and *In re Goodman and Co., Inc.*, 49 Agric. Dec. 1169 (1990)). When describing the "standard test for commercial bribery," the District of Columbia Circuit correctly removed goodwill business practices from the ambit of section 2(4), requiring instead that "[a]n agreement . . . exist between the payor and the recipient that there will be a *quid pro quo*." *JSG Trading I*, 176 F.3d at 545. Moreover, the Court explicitly acknowledged that the 1995 amendments to PACA confirmed the legality of good faith collateral fees, promotional allowances and rebates. *Id.* at 546. With this recognition, the District of Columbia Circuit instructed the USDA to announce and apply a standard for commercial bribery "in conjunction with the 1995 amendment[s] to PACA." *Id.*

After remand, the USDA purportedly abandoned its *per se* test, instead focusing on: (1) whether or not the payment or offer of payment was made with the general intent to induce business; and (2) whether or not the purchasing agent's "principal" or "employer" was "fully aware" of the payment or offer of payment. *See* Pet. App. at 28a. When announcing this test, the Judicial Officer did not address the 1995 amendments allowing good faith collateral fees made for the purpose of generating business. Instead, the Judicial Officer summarily stated that the payments at issue could not have been made in "good faith" because they were not fully disclosed. *See id.* at 78a. Therefore, in addition to changing its initial approach to commercial bribery, the USDA, through its Judicial Officer, ignored the instructions set forth in *JSG Trading I* by failing to account for the 1995 amendments to PACA.

On appeal, a different panel of the District of Columbia Circuit affirmed the new and "more formalized" test announced by the Judicial Officer. In so doing, the Court of Appeals acknowledged that the USDA applied vacillating standards to commercial bribery, but nevertheless held that

the agency must be given considerable deference when interpreting PACA. Pet. App. at 10a n.8. Without even addressing the business practices unique to the perishable agricultural commodities industry or meaningfully discussing the 1995 amendments to PACA, the Court of Appeals left the industry with two grim realities:

- First, the USDA may bring a commercial bribery investigation based on *any* collateral fee, off-invoice transaction or item of hospitality, if greater than a *de minimis* value, regardless of any nexus to a specific transaction. Indeed, the mere speculation that the proposed rebate or opera ticket may lead to business at some point in the distant future is enough to satisfy the general intent element announced by the USDA; and
- Second, the legality of all collateral fees and off-invoice transactions expressly authorized by the 1995 amendments to PACA now is conditioned on the "full awareness" of *all* potential principals and employers of purchasing agents, *regardless* of the more limited disclosure required in USDA's own regulations, *e.g.*, 7 C.F.R. § 46.2(hh), or the practical ability of PACA licensees to provide "full awareness" before their produce rots somewhere along the chain of distribution.

Thus, many business practices considered legal during the first 71 years of PACA and demanded by the unique realities of the industry now may result in a commercial bribery license revocation action brought by the USDA, as authorized by the Court of Appeals in *JSG Trading II*.

SUMMARY OF THE ARGUMENT

By broadly expanding the types of business practices capable of giving rise to commercial bribery under PACA, the decision in *JSG Trading II*, if left undisturbed, will present a Hobson's choice for every grower, distributor and supplier in the $100 billion perishable agricultural commodities industry.

If PACA licensees conduct business as usual and continue to provide the collateral fees and off-invoice transactions necessary to move produce along the chain of distribution and to the consumer, they may face a license revocation action brought by the USDA once a question of full disclosure arises. This question, of course, is inevitable because PACA licensees routinely provide good faith incentives to purchasing agents "on the spot" to move produce that otherwise would perish and often do not know the names of the "principals" or "employers" affiliated with purchasing agents. *See* 7 C.F.R. §§ 46.27(a)-(b).

Alternatively, PACA licensees may reform their longstanding business practices, at considerable costs to the entire industry, and attempt to provide full disclosure of all collateral fees and off-invoice transactions regardless of the realities presented by the movement of produce. Under this scenario, frantic calls, pages and e-mails will be sent to myriad "principals" or "employers" in the early morning hours seeking their consent to *each* off-invoice transaction necessitated by the circumstances. If full disclosure and consent is not possible within *each* fleeting window of opportunity, produce like fragile avocados will rot and losses will mount. Ultimately, the innocent consumer will be left to bear the financial burden of compliance with the wholly unrealistic expectations set by the USDA.

Factoring these equally unpalatable alternatives, this Court may accept review of *JSG Trading II* per the same reasoning that lead to its decision in a recent commercial bribery case, *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) ("*Sun-Diamond*"). Such review is appropriate because the holding in *JSG Trading II* cannot be reconciled with the plain language of section 2(4), the 1995 amendments to PACA and the regulations thereunder confirming the legality of good faith, off-invoice collateral fees and transactions. The holding in *JSG Trading II* also cannot be reconciled with the principles set forth by this

Court in *Sun-Diamond*, which involved analogous language in the federal gratuities statute. By returning to the actual language of PACA, the well-settled expectations of FDI's members and those of all other participants in the $100 billion perishable agricultural commodities industry may be preserved. Only then may perfectly legal methods of commerce continue without the fear associated with future license revocation actions brought by the USDA under boundless "standards" that even it cannot consistently apply from one hearing to the next, much less from one case to the next.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW, WHICH FLATLY CONTRADICTS THE PLAIN LANGUAGE OF PACA AND THE REGULATIONS THEREUNDER, THREATENS TO MATERIALLY DISRUPT THE PERISHABLE AGRICULTURAL COMMODITIES INDUSTRY.

A. The Plain Language Of PACA And The Regulations Authorizing Collateral Fees Define The Industry's Reasonable Expectations.

Since the enactment of PACA in 1930, participants in the perishable agricultural commodities industry have utilized off-invoice transactions to build business relationships, spread risk and achieve a modicum of certainty in an otherwise perilous industry. Recognizing that losses are inevitable due to the varying quality and perishable nature of produce, off-invoice transactions allow sellers and distributors to bring more produce to consumers within narrow time frames. Not surprisingly, after the USDA issued its first commercial bribery decisions under PACA in 1990 and 1991, FDI and other trade organizations lobbied Congress to confirm the legality of necessary off-invoice transactions. Congress responded by amending section 2(4) of PACA to state: "this

paragraph shall not be considered to make the good faith offer, solicitation, payment or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter." 7 U.S.C. § 499b(4). The Committee Report further clarified that "collateral fees" are considered "separate from invoice fees" and "refer to promotional allowances, rebates, service or material fees paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities." H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

With the 1995 amendments to PACA, industry members were able to conduct business with a clear understanding that collateral fees and off-invoice transactions were authorized if made in good faith, *i.e.*, for legitimate business purposes. From the enforcement actions brought by the USDA in *Goodman* and *Tipco*, industry members also should have been aware that section 2(4) prohibited commercial bribery "in connection with" "any [such] transaction" involving a perishable agricultural commodity. *See* 7 U.S.C. §§ 499b and 499b(4). More specifically, industry members should have been aware that conduct like the making of kickback payments tied to each package of produce then sold to unsuspecting buyers at higher prices would support a license revocation action. *See JSG Trading I*, 176 F.3d at 541-42 (summarizing the salient facts in *Goodman* and *Tipco*).

Thus, a clear line in the sand was drawn. On one side, conduct specifically designed to corrupt a transaction (and disrupt market forces to the ultimate detriment of the consumer) would support a commercial bribery enforcement action pursuant to section 2(4). On the other side, statutorily authorized collateral fees and off-invoice transactions, and general goodwill practices, like taking a business partner out to a nice meal or to a Redskins-Cowboys game, would fall outside of the USDA's prosecutorial reach. Now, without any statutory support whatsoever and with the blessing of the Court of Appeals in *JSG Trading II*, the USDA has

obfuscated this once clear line of demarcation and undermined the well-settled expectations of all members participating in the industry without even providing the opportunity for notice and comment.

B. Violations Of Section 2(4) Require A Nexus To Specific Transactions And Cannot Be Predicated On The General Intent To Foster Business Interests.

After the USDA initially attempted to apply a *per se* test to all off-invoice payments above a *de minimis* level, regardless of any nexus to a specific transaction, the District of Columbia Circuit rejected this "far-fetched notion[ ] of commercial bribery." *JSG Trading I*, 176 F.3d at 544. Acknowledging that all acts are in some way designed to promote business and curry favor, the District of Columbia Circuit required the USDA to make specific findings of the "intent to induce" within a *quid pro quo* arrangement. *Id.* at 545. In so holding, the District of Columbia Circuit attempted to preserve the well-settled expectations of the industry, as confirmed by the 1995 amendments to PACA. *See id.* at 545-56 (refusing to find commercial bribery within traditional business promotional efforts).

In *JSG Trading II*, however, the Court of Appeals rewrote PACA by bringing good faith collateral fees, off-invoice transactions and traditional goodwill practices under the umbrella of commercial bribery. After discussing the ample precedent requiring a nexus between the payment and a specific transaction, the Court of Appeals held that mere generalized intent to induce business is enough to support a PACA violation "given the substantial ambiguity in [section 2(4)]." *See* Pet. App. at 10a & n.8. Under the philosophy of deference to the agency, the Court of Appeals stated that the USDA was authorized to categorize "[s]ocial hospitality" and "[p]romotional allowances, rebates and the like" as bribes, absent full disclosure, because such acts are designed to induce business. *Id.* at 10a-11a.

When the Court of Appeals deferred to the USDA's expansive definition of commercial bribery, it ignored the initial question presented in all agency construction cases. Although deference is a default rule, assuming the agency acted within the permissible confines of the statute, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). As Congress defined the boundaries of the implied duty language in section 2(4), the Court of Appeals in *JSG Trading II* was required to reject the USDA's expansive definition of commercial bribery and end the inquiry.

While it is clear that commercial bribery is a PACA violation, the specific language of section 2(4) mandates that the failure "to perform any specification or duty, express or implied" must arise out of "any undertaking *in connection with any such transaction*." 7 U.S.C. § 499b(4) (emphasis added). The phrase "any such transaction" refers to:

> [A]ny transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker.

Id. When this language is read alone or in conjunction with the USDA's own precedent, only one reasonable conclusion may be reached—Congress plainly intended to limit section 2(4) to the context of actual transactions, like the *quid pro quo* kickbacks at issue in *Goodman* and *Tipco*. Otherwise, the words "any undertaking in connection with any such transaction," words previously considered jurisdictional by the USDA, impermissibly are rendered nugatory. *See Alkop Farms, Inc. v. Frupac Int'l Corp.*, 50 Agric. Dec. 1901, 1920-

21 (1991) (dismissing a portion of a section 2(4) complaint for lack of jurisdiction because trays of kiwifruit held in storage were not part of a defined "transaction"); *R.B. Todd Prod. Co. v. Frostreat Frozen Foods*, 22 Agric. Dec. 917, 920-21 (1963) (defining "transactions" that predicate jurisdiction as "consignments and purchases and sales"). As Congress chose to include these words in section 2(4), and later passed the 1995 amendments confirming the legal status of collateral fees and other off-invoice transactions, the USDA and the Court of Appeals must be held to interpret PACA as written.

More than a mere technical exercise, this critical error in statutory construction frustrates the purpose of section 2(4) and the 1995 amendments thereto. Safely assuming that all collateral fees (and other off-invoice transactions) are made for the general purpose of promoting business interests, every fee greater than a *de minimis* value, regardless of whether connected to a transaction, conceivably may lead to an enforcement action once a lapse in disclosure occurs. Whether the fee is made in "good faith" for a legitimate business purpose and is expressly authorized by Congress[4] is irrelevant under the USDA's new commercial bribery test, as described by the Court of Appeals. *See* Pet. App. at 10a-11a. Now all promotional allowances, rebates, sales incentives and acts of social hospitality, other than the providing of *de minimis* pens, calendars, cigarette lighters and the like, must be cleared in advance or else. While this "white gloves" standard may be the subject of academic discussion, it ignores general business reality, the unique considerations associated with distributing produce and, most importantly, the balance struck by Congress as best reflected in its own words. Unless

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[4] *E.g.*, "[A] promotional allowance, rebate, service or material fee paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities." H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

this Court provides clarity in the wake of *JSG Trading II*, all industry members, including the 220 members of FDI that contribute $183 billion to the economy, no longer will be able to sell and distribute produce according to their well-settled expectations.

C. The Nebulous "Full Awareness" Standard Adopted By The USDA Expressly Contradicts The Agency's Own Regulations.

After erasing the "in connection with any such transaction" language right out of section 2(4), the USDA and the Court of Appeals also added qualifying language to Congress' express authorization of collateral fees. While PACA does not state that collateral fees are made in "good faith" only if the buyer is made "fully aware" of said fees, the Court of Appeals held that "payments intended to induce the buyer's agents or employees to purchase produce are commercial bribes unless the payee's principal or employer is fully aware of the transaction." *See* Pet. App. at 9a. The Court of Appeals also implied, without expressly holding, that "without an affirmative grant of consent by the payee's principal or employer the secrecy element [of commercial bribery] would be satisfied." *See id.* Even if this amorphous disclosure standard were capable of being understood, *see infra* at pp. 15-16, it cannot withstand scrutiny in the light of the USDA's own regulations governing collateral fees.

In connection with the 1995 amendments to PACA, FDI and other trade associations requested notice and comment regarding the extent of the disclosure of collateral fees and other off-invoice transactions required by the USDA. *See* Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). The USDA responded by issuing a rule stating that "collateral fees and expenses" must be disclosed to "all other parties to the transaction" only when they "affect a material term of the agreement," such as the price to be paid by the buyer for the produce. *See* 7 C.F.R.

§ 46.2(hh). Having limited disclosure to certain collateral fees only, the USDA, through decisions of its Judicial Officers, cannot rewrite this rule to require "full awareness" disclosure of all off-invoice transactions that exceed a *de minimis* value regardless of whether they implicate a material term of the agreement. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959).

Furthermore, the USDA has acknowledged that, in many circumstances, purchasing agents and brokers are given blanket authority to negotiate for buyers "not known to the seller." 7 C.F.R. §§ 46.27(a)-(b). Accepting the USDA's new disclosure standard on its face, sellers and distributors now must take the necessary time to make unknown "principal[s]" or "employer[s]" of unknown buyers "fully aware" of all collateral fees and off-invoice transactions before consummating sales and consignments, *see* Pet. App. at 9a, while their produce loses value as the minutes, hours and, perhaps, days pass. Moreover, PACA licensees are left with no guidance as to the meaning of the operative terms "purchasing agent," "principal," "employer" and "fully aware" within this unforgiving disclosure requirement.

For example, the following questions, among others, remain unanswered:

- What exactly must be disclosed to satisfy the "fully aware" standard (*e.g.*, the amount of the fee, a description of the facts of the sale, the business justification for the fee, any subsequent changes to projected cost, or all of the above)?
- Is it sufficient to disclose the collateral fee to a store manager, a regional vice president, the chief executive officer, or the board of directors, or all of them?
- Is consent of the "principal" or "employer" required?
- If a buyer is *de facto* controlled by other corporate entities, including international entities wherein translators may be required to provide consent before a

box of avocados may be sold, is consent required from all such entities, if any?

- What happens if consent, if required, is initially provided but later is overruled by a higher-ranking official of the "principal" or "employer"?
- Are after-the-fact awareness and consent sufficient, assuming that consent is required and that a seller or distributor is willing to take the risk that the principal or employer may withhold consent?
- Does abiding by a habitual course of conduct among the same PACA licensees amount to full awareness even if actual knowledge is not imparted before every transaction is consummated?

As these very real questions illustrate, the USDA's definition of commercial bribery fails to meet the required "intelligible decisional standard" because it ignores the practical considerations presented by the sale and distribution of produce. *See Checkosky v. Securities and Exch. Comm'n*, 139 F.3d 221, 224 (D.C. Cir. 1998) (holding that a vague mental intent "standard" susceptible to varying interpretations does not provide sufficient direction to regulated persons); *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1199-1200 (D.C. Cir. 1998) (holding that the USDA's "actively involved" standard was too vague for the purposes of defining the term "reasonably connected" contained in the license restriction sections of PACA).

If this Court does not address the USDA's standardless definition of commercial bribery, members of the industry inevitably will treat the "full awareness" requirement differently, leaving the USDA with myriad opportunities to pursue license revocation actions. Not only will the specific purpose of the 1995 amendments be frustrated, numerous lawsuits and due process challenges will follow, leaving the industry in a state of hopeless confusion. More importantly, avocados and the like will rot in marketplaces while sellers

and distributors scramble to secure consent from undisclosed principals or employers of undisclosed buyers. Assuming that normal market forces hold true, consumers will bear the burden of paying higher prices for the short supply of avocados and the like that actually reach them in an edible condition.

II. THE DECISION BELOW CONFLICTS WITH THE SPECIFIC PRINCIPLES ANNOUNCED IN PRIOR COMMERCIAL BRIBERY DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEAL.

In addition to presenting a matter of great importance to members of the industry and, ultimately, to all consumers of perishable produce, the *JSG Trading II* decision demands review because it conflicts with the specific principles set forth by this Court in *Sun-Diamond*. The *JSG Trading II* decision also conflicts with the consistent reasoning of the circuit courts of appeal when interpreting analogous commercial bribery statutes. In its haste to defer to the USDA, the Court of Appeals ignored established precedent that should have governed its construction of section 2(4).

As discussed in section I.B. *supra*, PACA requires a nexus between a transaction and an allegedly improper payment before commercial bribery may be established in violation of section 2(4). This conclusion was reinforced in *JSG Trading I*, a decision that even the Court of Appeals in *JSG Trading II* described as "elliptically suggest[ing] [that] a *quid pro quo* element" would restore the reasonable expectations of the industry. *See* Pet. App. at 9a. Furthermore, the Court of Appeals also recognized that this Court "required a *quid pro quo*" in *Sun-Diamond*, but purported to distinguish *Sun-Diamond* on the basis that a different statute was under review. This cursory analysis cannot suffice to avoid the clear conflict between *JSG Trading II* and established commercial bribery precedent, as well as precedent of this Court.

When reviewing the federal gratuities statute, 18 U.S.C. § 201 *et seq.*, this Court held that bribery must be linked to a specific official act, and not mere generalized intent to influence an official in his or her position of authority. *Sun-Diamond*, 526 U.S. at 406-10. Focusing on the language "for or because of any official act performed by such public official," this Court rejected the government's position that the general motivation to "build a reservoir of goodwill" and influence the "capacity to exercise governmental power" amounted to bribery in violation of 18 U.S.C. § 201(c)(1)(A). *Id.* at 405-06. Relying on the words chosen by Congress, this Court held that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id.* at 406. Relying on common sense, this Court stated that the more natural (and more specific) meaning of the words "official act" was necessary "because of the peculiar results that the Government's alternative reading would produce." *Id.* After reciting the many goodwill acts that would be rendered illegal under the government's expansive construction of the federal gratuities statute, including the giving of replica jerseys and complimentary lunches, this Court stated:

> Thus, when the violation is linked to a particular 'official act,' it is possible to eliminate the absurdities *through the definition of that term.* When, however, no particular 'official act' need be identified and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.

Id. at 408 (emphasis in original). Choosing to leave the government with a "scalpel," instead of a "meat axe," this Court gave meaning to the words "official act" by requiring that illegal gratuities prosecutions are based on targeted prohibitions, not unfettered discretion. *Id.* at 412.

For the same reasons, the circuit courts of appeal and the USDA, in all decisions prior to *JSG Trading II*, have held that commercial bribery requires a nexus between payment (or the offer of payment) and a concrete "act" or "transaction" specified in the statute at issue. *E.g.*, *JSG Trading I*, 176 F.3d at 545-46 (interpreting PACA to require *quid pro quo*); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990) (refusing to find commercial bribery under the Robinson-Patman Act without a relationship that connects purchasing decisions to the payments at issue); *Holiday Food Serv., Inc. v. Dep't of Agric.*, 820 F.2d 1103, 1105 (9th Cir. 1987) (finding a *quid pro quo* nexus to support commercial bribery under the Packers and Stockyards Act); *National Beef Packing Co. v. Secretary of Agric.*, 605 F.2d 1167, 1168 (10th Cir. 1979) (identifying the *quid pro quo* nexus for a commercial bribery violation under the Packers and Stockyards Act). *See also United States v. Schaffer*, 183 F.3d 833, 840-46 & 846 n.14 (D.C. Cir. 1999), *vacated by pardon in* 240 F.3d 35 (D.C. Cir. 2001) (interpreting the federal gratuities statute and the more expansive Meat Inspection Act based on the interpretative methods announced in *Sun-Diamond*). Having recognized the importance of *Sun-Diamond* when construing the Meat Inspection Act, the District of Columbia Circuit cannot do an about-face solely because *Sun-Diamond* interpreted a statute "containing . . . different language than PACA." The critical question avoided by the Court of Appeals in *JSG Trading II* is whether the reasoning in *Sun-Diamond* and similar commercial bribery cases applies to the language chosen by Congress in PACA.

Clearly comparable to this Court's analysis of the "official act" language in the federal gratuities statute, violations of section 2(4) must be connected to PACA "transactions," *i.e.*, consignments, purchases or sales of perishable agricultural commodities. *See supra* at pp. 11-14. When the precise language of section 2(4)—"undertaking in connection with

any such transaction"—is read alone or in conjunction with Congress' express authorization of good faith collateral fees and off-invoice transactions without further qualification, the principles in *Sun-Diamond* simply cannot be ignored. By choosing exact language instead of broadly prophylactic language, Congress demonstrated its plain intent to give the USDA a "scalpel" and not a "meat axe," at least relative to enforcement actions involving collateral fees and other off-invoice transactions. Otherwise, the USDA would be left with boundless discretion to initiate revocation actions against PACA licensees once something more than a pen, calendar or cigarette lighter is offered to a purchasing agent or broker without full disclosure to all principals and employers. On behalf of 220 members of the perishable agricultural commodities industry that contribute billions of dollars to the economy, FDI respectfully contends that this result cannot be allowed to stand.

CONCLUSION

For any or all of the foregoing reasons, FDI respectfully contends that the petition for certiorari should be granted.

Respectfully submitted,

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